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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

70-268

No. ~~1813~~

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Petitioners,

versus

THE DAY COMPANIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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Claud T. Patat, Jr., John L. Farris, and Patat Plywood Corporation, your petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case on April 16; 1971.

OPINIONS BELOW

The opinion of the District Court, on which an injunction was granted in favor of respondent, has not been reported. A copy is appended as Appendix I.

The opinion of the Court of Appeals, affirming the grant of an injunction, has not been reported. A copy is appended as Appendix II.

A copy of the judgment is appended as Appendix III.

This case was previously considered by the Fifth Circuit Court of Appeals. **Day Companies v. Patat**, 5 Cir., 403 F. 2d 792.

Petition for certiorari to review the previous decision of the Fifth Circuit Court of Appeals was denied, 397 U.S. 1111, 89 S. Ct. 993, 22L. Ed. 2d 122.

JURISDICTION

The judgment of the Court of Appeals was entered April 16, 1971. No Petition for Re-hearing was filed.

Jurisdiction to issue the writ is invoked, pursuant to the provisions of Title 28, Section 1254 (1), United States Code.

Federal jurisdiction was initially invoked by respondent at the time of filing the original complaint on the ground of diversity of citizenship and amount involved pursuant to the provisions of Title 28, Section 1332 (a) (1), United States Code.

QUESTIONS PRESENTED

I. Whether in its opinion affirming the decision of the District Court, the Fifth Circuit Court of Appeals contrary to the Rules of Decision Act (**Title** 28, **Section** 1652, **United States Code**,) decided an important State question in a way in conflict with applicable Georgia law.

II. Whether in its opinion affirming the decision of the District Court, the Fifth Circuit Court of Appeals failed to apply the most recent interpretation of Georgia law as set forth in decisions of the Supreme Court of Georgia, its court of last resort.

STATUTES INVOLVED

The only United States statute involved is **Title 28, Section 1652, United States Code,** which provides:

> "The laws of the several states, except where the constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as Rules of Decision of Civil actions in the courts of the United States, in cases where they apply."

The applicable Georgia Statute is **Georgia Code Section 20-504** which provides:

> "**Contracts against public policy; illustrations.**—A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty."

STATEMENT OF THE CASE

The Day Companies, Inc., a Mississippi corporation, alleging itself to be successor by merger to Columbus Packing Company, Inc., invoking jurisdiction upon the basis of diversity of citizenship and amount involved, instituted an action for injunctive relief and damages in the Rome Division of the United States District Court for the Northern District of Georgia against Patat Plywood Corporation, a Georgia corporation, and Claud T. Patat, Jr. and John L. Farris, Georgia residents.

The complaint alleged that Farris Plywood Company, a Georgia corporation of which John L. Farris was president and principal stockholder, located at Cuthbert,

Georgia, engaged in the manufacture of plywood, and having earned surplus and undistributed profits in excess of $400,000.00, was acquired by Columbus Packing Company, Inc., on April 20, 1966, through the purchase of all of its outstanding capital stock for an aggregate sum of $465,000.00 from John L. Farris, Mrs. Nora Lee Farris, Mrs. Lois Farris McLendon and Carolyn Farris. Claud T. Patat, Jr., was the manager of said corporation.

The contract of sale provided in part that John L. Farris would remain in the employ of the company in an advisory and consulting capacity until December 31, 1966, at a salary of $500.00 per month and contained the further proviso that

> "... the said John L. Farris, individually, further agrees that during the term of his said employment, and for a period of five years thereafter (that is, until December 31, 1971) he will not, either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris."

The contract further provided that the salary of Claud T. Patat, Jr., of $1,000.00 per month would be continued for the remainder of 1966, and that he be paid a bonus of $10,000.00 December 31, 1966, which obligations were complied with by Columbus Packing Company, Inc. All common stock in Farris Plywood Company was transferred to Columbus Packing Company, Inc., which became sole stockholder and owner of Farris Plywood.

It was further alleged that Claud T. Patat, Jr., together with Francis E. Patat, and Claud T. Patat, Sr., incorporated Patat Plywood Corporation in Polk County, Georgia, March 15, 1967, which company began business March 22, 1967, with Claud T. Patat, Jr., as President

and John L. Farris as Vice President and Treasurer, and that Patat Plywood Corporation was engaging in the manufacture and production of plywood which it is selling in the same area in which Farris Plywood was operating on April 20, 1966, and in which the Day Companies, Inc., is still operating.

The complaint further alleged that defendants Patat and Patat Plywood Company had knowledge of the terms of the contract signed by John L. Farris, and with full knowledge thereof are aiding and abetting John L. Farris to violate his contract in that he is connected with and concerned in a business and employment in direct competition with the plaintiff in the area operated in by Farris Plywood Company at the time the contract was executed, thereby causing the plaintiff irreparable damage, and that plaintiff had been damaged in the sum of $100,000.00 by the combined acts of the defendants. Injunctive relief and damages in the sum of $100,000.00 were sought.

Defendants filed a Motion to Dismiss pursuant to Rule 12(b), Federal Rules of Civil Procedure, averring that the covenant not to compete was contrary to the public policy of the State of Georgia (**Georgia Code Section** 20-504), and so indefinite as to the description of the business and employment sought to be prohibited as to be unreasonable.

The District Court, relying upon the latest decision of the Supreme Court of Georgia, **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 156 S.E. 2d 910, entered an order dismissing the complaint. Respondent appealed from such dismissal, and upon review the Fifth Circuit Court of Appeals reversed the judgment and remanded the case for further proceedings consistent with the views expressed in its opinion.[1]

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[1] The opinion of the Fifth Circuit Court of Appeals (403 F.2d 792), contained no reference whatever to **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 156 S.E.2d 910.

Appellants thereupon sought the grant of certiorari under the doctrine of **Erie Railroad Company v. Tompkins**, 304 U.S. 64, and **Guaranty Trust Company v. York**, 326 U.S. 99, upon the ground of "substantially different" result reached from that which would have been reached by the Georgia Courts. Certiorari was denied, 397 U.S. 1111, 89 S. Ct. 993, 22 L.Ed. 2d 122.

Following receipt of the mandate from the Fifth Circuit Court of Appeals, the District Court heard the injunctive feature of the case and granted an injunction in favor of plaintiff. While as entered the injunction prohibited sale to or solicitation of orders from 25 concerns located throughout the United States, the evidence adduced at the hearing established without substantial dispute that from the inception of Farris Plywood Company as an operating entity

(a) Dulaney Plywood Corporation of Louisville, Kentucky purchased its entire output;

(b) Dulaney sold such plywood to its own customers at prices determined by it;

(c) Dulaney directed Farris to ship same f.o.b. Cuthbert, Georgia, to such customers;

(d) The shipments were made under bills of lading showing Dulaney as the "consignor" or "shipper";

(e) Farris was paid by Dulaney without regard to whether or not Dulaney ever collected from its customers for the goods so shipped;[2] and

(f) Dulaney — not Dulaney's customers — received Title to the goods from Farris.

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[2] The balance sheet attached to and made a part of the contract between Columbus Packing Company and Farris listed as its only substantial receivable "Dulaney Plywood Corporation $89,806.48."

The evidence further established **two** matters of **critical significance** involving actions of the plaintiff itself **prior** to the incorporation of Patat Plywood Corporation, viz.:

(a) First, on September 20, 1966, plaintiff informed Dulaney it intended to terminate the long standing arrangement and "sell our product direct" which agitated Dulaney who stated "I will get me another source of supply, and we will fight it out." Plaintiff then contracted to pay Dulaney $12,500.00 per year for two years; $15,000.00 to C. M. Hilton (one of Dulaney's employees) for one year; and $7,500.00 to Miss Edith Loveless (another Dulaney employee) for one year. Thus plaintiff acquired the sales organization of Dulaney.

(b) Secondly, on November 14, 1966, Farris Plywood Company was dissolved by an order of the Superior Court of Randolph County, Pataula Judicial Circuit. Plaintiff thereby terminated the existence of the Georgia corporation with which petitioner John L. Farris had covenanted to not compete.

In its decision the Fifth Circuit Court of Appeals considered

> ". . . the covenant applied to all those customers who were purchasing manufactured goods produced by Farris at the time he sold the business."

The fundamental legal concepts implicit in Plaintiff

(a) Purchasing Dulaney's sales organization in order to secure unrestricted access to his customers; and

(b) Dissolving Farris Plywood Company as a corporate entirely so that competition with it would no longer be possible;

have been completely glossed over and lost sight of.

REASONS FOR GRANTING THE WRIT

I. By its decision in the instant case the Fifth Circuit Court of Appeals has decided important State questions in a way clearly in conflict with applicable Georgia law contrary to the Rules of Decision Act (Title 28, Section 1652, United States Code), and thus ignored this Court's admonition in **Erie Railroad Company v. Tompkins**, 304 U.S. 64, and **Guaranty Trust Company v. York**, 326 U.S. 99.

II. By its decision in the instant case the Fifth Circuit Court of Appeals failed to follow, and in fact completely ignored, the most recent interpretations of Georgia law as set forth in decisions of the Supreme Court of Georgia, its court of last resort, and thus ignored this court's admonition in **Vandenbark v. Owens Illinois Glass Company**, 311 U.S. 538, and **Meredith v. City of Winter Haven**, 320 U.S. 328.

I

Decision in Conflict With Applicable Georgia Law

Petitioners are mindful that their previous request for review did not commend itself to the Court's discretion. At that time, however, the Court had before it only the complaint, as amended, motion to dismiss, and opinions of the District Court dismissing the complaint and of the Fifth Circuit reversing the dismissal. The documentary evidence, depositions, and oral testimony summarized hereinbefore and in the District Court's opinion [Appendix I] now point up the extent to which the respondent has secured a "substantially different" result from that which would have been afforded in the Georgia Courts, and that petitioners have been denied the safeguards of the Rules

of Decision Act [Title 28, Section 1652, United States Code]. The decisions as entered, both of the District Court and Fifth Circuit Court of Appeals (Appendix I and II) ignore the holdings of the Supreme Court of Georgia with respect to

(a) The relationship between Farris Plywood Company and Dulaney Plywood Corporation; and

(b) The geographic area encompassed by the covenant not to compete.

(a)

Dulaney an Independent Dealer

The holding that Dulaney Plywood Corporation was a "sales agent" is contrary to the rule which has obtained in Georgia since 1893, when in **Central Georgia Land & Lumber Company v. Exchange Bank of Macon**, 101 Ga. 345, 28 S.E. 863, the Supreme Court held that:

> "One who, on his own account, engages in the business of purchasing goods for the purpose of filling orders received by him from others, and who in fact fills the same at places therein specified, looking for his profits to the difference between what he pays and what he receives in these transactions, is not, though in each instance the order is received before the purchase is made, the agent of the persons by whom the orders are given, but an **independent dealer buying** and selling in his own behalf." (Emphasis supplied.)

The District Court, as a predicate for the conclusion that "Dulaney's customers were Farris' customers and vice-versa" expressed the view

> "In truth, the arrangement was a paternalistic supervision of his own creation by Dulaney . . ."

Under Georgia law, "paternalism" does not transform an "independent dealer" into a "sales agent". This view has obtained since 1906 when the Georgia Supreme Court decided **Daniel v. Maddox-Rucker Banking Company**, 124 Ga. 1063, 53 S.E. 573. We quote (p. 1065):

> "The defendant insists that this contract created the relation of principal and agent, that the defendant was not responsible for any loss of weight in the cotton occasioned by the failure of the railroad company to promptly transport the cotton to Atlanta, that the weights of cotton at the place of purchase were correctly ascertained, and that the losses in weight caused by the delay in shipment fell upon his principal. We are unable to agree with his counsel in this contention. The plaintiff bank obligated itself to furnish, as the market fluctuated, a basis upon which it would take the cotton, at Atlanta weights, and guarantee the specified price to the defendant; and the plaintiff agreed, in addition thereto, to pay the defendant a commission of 25 cents for each bale purchased. There was no obligation on the part of the banking company to furnish money to the defendant with which to purchase the cotton. The advances which it made to him were entirely voluntary and for his accommodation. The business of the defendant was that of an independent cotton buyer who has prudently undertaken to arrange with a purchaser, in advance, to take such cotton as he might be able to buy on the basis of certain prices to be furnished him from time to time by such purchaser. The defendant thus sought to protect himself against sudden market fluctuations and to assure himself of a profit of at least 25 cents a bale on all cotton which he bought, in case there was no loss in weights at the delivery point and the cotton was properly classified on the

purchasing basis. If he was able to buy at a price less than that stated in the basis furnished him by the banking company, he would make an additional profit. The contract amounted to no more than an agreement to pay for cotton shipped to the banking company a specified price, on delivery at Atlanta, with an additional allowance of 25 cents per bale. **This agreement did not constitute the defendant the agent of the banking company.**" (Emphasis supplied.)

(b)

Covenant Extended Beyond Permissible Geographic Area

As entered the injunction prohibits sales to or solicitation of orders from twenty-five (25) concerns located in a geographic area extending from Syracuse, New York, southward to Miami, Florida, westward through Mobile, Alabama (including named cities in Louisiana, Mississippi, and Texas), to El Monte, California, and eastward to Merrill, Wisconsin (including named cities in Illinois and Indiana).

In **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 165 S.E. 2d 910, previously mentioned herein, the Supreme Court of Georgia considered a covenant by Fox "not to engage in competition with the company or any subsidiary of the company for a period of two years after such termination date **in any city of the United States** wherein he was, in the five (5) years preceding such termination date, employed or stationed by the company or any subsidiary of the company." The Court held:

> "The agreement not to engage in competition with the company or any subsidiary of the company is fatally defective and void because it is indefinite, and

for this reason unreasonable, in the description of the prohibited business."

Admittedly the Georgia Supreme Court did not there discuss geographical area. However, on October 14, 1970 (subsequent to the first review sought herein) it decided **Moore v. Dwoskin, Incorporated**, 226 Ga. 835, 177 S.E. 2d 708 and **Taylor Publishing Company v. Jones**, 226 Ga. 832, 177 S.E.2d 655. In **Moore** the Court held:

> "An employment contract which prohibits an employee from pursuing his trade or business **in the primary business areas of 31 states** is unreasonable, contrary to public policy, and void" (Emphasis supplied).

The thrust of this decision obviously is "the primary business areas of 31 states." **Taylor Publishing Company v. Jones**, supra, proscribed only the area "within the State of Georgia," but with the same result.

To the same effect are Georgia Supreme Court decisions in **Edwin K. Williams & Co.-East v. Padgett**, 226 Ga. 613, 176 S.E. 2d 800, holding void a covenant to not solicit "for himself or others the accounts served by Edwin K. Williams & Co. (Va.)" and **Colonial Life & Accident Insurance Company v. Byrd**, 227 Ga. 198, 179 S.E. 2d 746, prohibiting sale of insurance to customers of the insurer located in the "territory covered by this agreement."

It is no answer to say these were employment cases since **Fox** involved a Stock Purchase Contract, and the Supreme Court of Georgia has historically applied the same standards in sales of businesses or dissolution of partnerships as it applies to employment contracts, the only real difference emerging from the holdings being that in the sale of a business "it is not required that it be limited as to time." **Wood v. McKinney**, 205 Ga. 370, 371, 53 S.E. 2d 684.

II

The Public Policy of Georgia Has Been Ignored

As to matters of State law this Honorable Court stated in **Brady v. Maryland**, 373 U.S. 83, 90:

> "... state courts, state agencies and state legislatures are its final expositors under our federal regime".

The public policy of Georgia is embodied in **Georgia Code Section** 20-504, viz:

> "A contract which is against the policy of the law cannot be enforced; such are ... contracts in general restraint of trade ..."

Its court of last resort, by decisions hereinbefore quoted, has expressed views which should have received recognition by the Fifth Circuit Court of Appeals. Such failure to so recognize calls for the grant of certiorari as was done in

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538;

and

Meredith v. City of Winter Haven, 320 U.S. 228.

Jurisdiction was conferred upon the Federal Courts in diversity of citizenship cases to provide non-residents with a forum in which they might expect to receive equality of result with residents of the particular state. The limits of that jurisdiction were stated in **Angel v. Bullington**, 330 U.S. 183:

> "A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld."

Such limitation has not been observed here.

CONCLUSION

It is obvious the Fifth Circuit Court of Appeals, finding itself in disagreement with the public policy of Georgia, has declined to follow it. The admonition of **Erie Railroad Company v. Tompkins**, 304 U.S. 64, has been twice ignored in the instant case. The situation here presented can be rectified only by the grant of certiorari.

Respectfully submitted

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